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In the

Supreme Court of the United States

October Term

1959

No. 753

ELLA BELL BENEDICT, ET AL.,
Petitioners.

vs.

HAMILTON COUNTY BOARD OF REVISION;
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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In the

SUPREME COURT OF THE UNITED STATES

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No. _____

ELLA BELL BENEDICT, ET AL.,
Petitioners,

vs.

HAMILTON COUNTY BOARD OF REVISION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio, made and entered in the above entitled cause on November 18, 1959.

OPINION BELOW

The opinion of the Supreme Court of the State of Ohio was made on November 18, 1959. On December 2, 1959, a petition for rehearing of the case in the Supreme Court of Ohio was filed and on December 18, 1959, a rehearing was denied.

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered on the 18th day of November, 1959 and

on Dec. 18, 1959 a mandate was sent on that date to the Board of Tax Appeals of the State of Ohio and copies thereof are appended to this petition in the Appendix at pp. 1a, 2a, and 3a. The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

The question raised is whether the taxing authorities of the State of Ohio in valuing the petitioners real property known as the Bell Block Building, located at the northeast corner of Sixth and Vine Streets in the City of Cincinnati, Hamilton County, Ohio, for tax purposes, deprived the petitioners of due process of law and denied them equal protection under the law in violation of the 14th Amendment of the Constitution of the United States and Article XII, Section 2 of the Constitution of the State of Ohio where the petitioners property was valued at 87% of its true value in money as evidenced by its recent sale price, whereas substantially all other similar properties in the area were taxed at an average of 60% of their true value in money as evidenced by their recent sale prices.

STATUTES AND CONSTITUTIONAL PROVISIONS

The pertinent portions of *Article XII, Section 2 of the Constitution of the State of Ohio; Revised Code of Ohio, Sections* 5713.04, 5717.03 and *14th Amendment to the Constitution of the United States*, are set forth in the Appendix at pp. 4a, 5a, 6a and 7a.

STATEMENT

In a complaint before the Board of Tax Appeals the petitioners sought a reduction in the assessed value of their business real estate in downtown Cincinnati known as the Bell Block Building for the year 1957.

The Hamilton County Assessor originally fixed the valuation of the property at January 1, 1957, as follows:

Land:	$387,360.00
Building:	92,800.00
Total	$480,160.00

The Hamilton County Board of Revision determined that the assessed value at January 1, 1957 should have been as follows:

Land:	$387,360.00
Building:	74,240.00
Total	$461,600.00

The petitioners claimed that they were entitled to have the property valued for assessment purposes as follows:

Land:	$250,000.00
Building:	50,000.00
Total	$300,000.00

At the hearing before the Board of Tax Appeals of the State of Ohio, the petitioners produced an expert witness with much experience in valuation, in the person of Walter Hadley. Mr. Hadley was a member of the American Institute of Real Estate Appraisers, the National Association of Real Estate Builders, a former member of the Cincinnati Zoning Board of Appeals, the Cincinnati Building Owners and Managers Associations, and many other societies, and had taught on the Faculty of Chase College and Xavier University in Cincinnati. (R. 16-17-18-19) This witness

had extensive practical experience in the appraisal of downtown real estate in the City of Cincinnati. (R. 17).

He testified that he had studied the recent sales prices of nine large downtown properties, comparable to petitioners, and had ascertained their assessment values as determined by the Hamilton County Assessor. (R. 20-21)

He testified that he had determined that properties similar to petitioners in the downtown area of Cincinnati were taxed at an average of 60% of their recent sales prices. (R. 25).

He further testified that from a study of the petitioners property, the Bell Block Building, he had determined that its tax value for assessment purposes represented 87% of its recent sale price. (R. 26)

The Hamilton County Board of Revision produced no evidence. (R. 38).

In the companion case heard by the Board of Tax Appeals and the Supreme Court of Ohio, *Regal Realty Co.* v. *Hamilton County Board of Revision* 169 *O.S.* 289, the Auditor of Hamilton County testified under a stipulation that his testimony would be considered as evidence in this case, that pursuant to Entries of the Board of Tax Appeals of August 25, 1952 and December 1, 1954, which required County Auditors to bring the valuations in their counties up to 50% of true value, he increased the entire Hamilton County duplicate by 10%.

> "*Q.* Now, Mr. Guckenberger, upon receipt of this particular entry of August 25, 1952, what, if anything, did you directly do concerning the entry or because of it concerning valuation of property in Hamilton County, Ohio?
>
> *A.* I think this came with an order that we should increase our entire county 10%, if I remember right. I haven't gone through this, but I think that is what it was. Isn't that right?"

The petitioners urged that the valuation should be reduced to 60% of the recent sale price representing true value, for the reason that substantially *all other similar property in the downtown area is assessed at 60% of its true value,* and that the assessment was discriminatory to the petitioners, and violated their constitutional rights under the 14th Amendment to the Constitution of the United Sates to equal protection under the law.

The Board of Tax Appeals of Ohio adopted the valuation ascribed to this property by the Hamilton County Board of Revision.

Thereupon an appeal was taken to the Supreme Court of Ohio, which Court affirmed the Board of Tax Appeals' holding in an opinion set forth at Appendix pp. 1a.

The Federal question sought to be reviewed here was raised at every stage of the proceedings. It was first raised in the Brief of the Appellant filed with the Board of Tax Appeals after the hearing before that Board, at page 5, as follows:

> "Where evidence demonstrates (as in this case it does) a systematic discrimination in valuation, a refusal to consider the disparity between the valuations in the same area has been held to be a violation of the 14th Amendment, *Sioux City Bridge Co.* v. *Dakota County, Nebraska* 260 *U.S* 441."

The Board of Tax Appeals in its entry of January 30, 1959, at page 6, considered the constitutional question of discrimination and denial of due process under the 14th Amendment of the Constitution of the United States and concluded:

> "In this connection we might refer the Appellant to the case of *Rollman & Son Co.* v. *Board of Revision of Hamilton County, Ohio* 163 *O.S. Reports, at page* 363, wherein Judge Matthias used this language:

> The sole question before the Board of Tax Appeals on the appeal from the Board of Revision was whether the property in issue is valued at its true value in money. It having been determined that the order of the Board of Tax Appeals is reasonable and lawful, the appellant has not shown that it was injured by the action of the Board, and one who is not injured thereby cannot question the validity of a statute or an order of administrative body. *The fact that others may have property which is valued at less than its true value in money is not a denial of equal protection to the appellant because of the rights available to it under Section 5609, General Code, which provides for filing a complaint as to the undervaluation of the property of others* and therefore is not an issue, which may be raised by the appellant in this case." (Emphasis ours)

The petitioners next raised the constitutional question in its Notice of Appeal to the Supreme Court of Ohio at page 2, as follows:

> "(6) The decision ascribed a value to the real estate owned by appellants based on a formula which did not conform to a uniform rule applicable to all real property of the same or similar kind in the same or similar neighborhoods and therefore violates the provision of Section 2, Article XII, of the Constitution of the State of Ohio and Section 1 of the 14th Amendment of the Constitution of the United States."

Following this, the petitioners raised the constitutional question in its Brief before the Supreme Court of Ohio in a similar manner to the way it had been raised before the Board of Tax Appeals. This appears at pages 6 and 8 of the Brief of Appellants therein.

Following the hearing before the Supreme Court of Ohio, said Court handed down an opinion reprinted herein at Appendix pp. 1a which did not decide or pass upon the constitutional question raised by the petitioners.

The constitutional question was again raised in an application for a rehearing before the Supreme Court of Ohio at page 1:

> "(3) The Court's attention is respectfully called to the fact that in the opinion there is no discussion upon any of the several important constitutional questions set forth in the Briefs, nor does the Court indicate that it considered the case of *Sioux City Bridge Co.* v. *Dakota County, Nebraska* 260 *U.S.* 441." . . .

REASONS FOR GRANTING THE WRIT

The decision of the Court below has decided an important question to all owners of both real and personal property in states which have laws taxing property at their true value in money. This issue has previously been settled by this Court in several instances, the most notable of which are *Sioux City Bridge Co.* v. *Dakota County, Nebraska* 260 U.S. 441, *Green Auditor, et al., Constituting the Board of Valuation and Assessments for the State of Kentucky, et al* v. *Louisville & Interurban Railroad Company* 244 U.S. 499 and *Sunday Lake Iron Co.* v. *Wakefield* 247 *U.S.* 350. The Supreme Court of Ohio did not deal with these decisions in its opinion and did not distinguish the case before it. In essence, the Supreme Court of Ohio reaffirmed its decision in *Rollman & Sons Co.* v. *Board of Revision of Hamilton County, Ohio,* 163 O.S. 363, wherein it had held:

> "The sole question before the Board of Tax Appeals on the appeal from the Board of Revision was whether the property in issue is valued at its true value in money. It having been determined that the order of the Board of Tax Appeals is reasonable and lawful, the appellant has not shown that it was injured by the action of the Board, and one who is not injured thereby cannot question the validity of a statute or an order of an administrative body. *The fact that others may have property which is valued at less than its true*

> *value in money is not a denial of equal protection to the appellant because of the rights available to it under Section 5609, General Code, which provided for filing a complaint as to the undervaluation of the property of others* and therefore is not an issue, which may be raised by the appellant in this case." (Emphasis ours)

The Supreme Court of Ohio in the present case clearly avoided a direct pronouncement by it on the rights of a taxpayer whose property is taxed at a greater percentage of true value than substantially all other like property in the area.

The Court held that:

> . . . the determination of the true value of each parcel of real estate . . . does not wholly depend on values accorded other parcels in the vicinity . . . *after all, the true value of the particular property is the controlling consideration* . . ." (Emphasis ours)

In the instant case the Court misinterpreted the petitioners contention. The petitioners did not contend that the value attributed their property exceeded *true value*. They contended that the Board of Revision *after* ascertaining what was in their judgment the true cash value of petitioners real property reduced said value only to the extent of 87% instead of to the extent of 60%, which was the average rate which they applied to substantially all other similar property.

The Supreme Court of Ohio has on former occasions been the great proponent of uniformity in mode of assessment. In *Exchange Bank of Columbus* v. *Hines* 3 *Ohio State* 1, which was quoted by the Supreme Court of the United States in *Cummings* v. *National Bank* 101 *U.S.* 153, 158 and in *Green supra* the Court said:

> "Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the *mode of assessment upon the taxable valuation*. Uniformity in taxing implies equality in the burden of

taxation and this equality of burden cannot exist without uniformity in the mode of assessment, as well as in the rate of taxation." (Emphasis ours)

Apparently the *Rollman case, supra,* represents the current state of the law of Ohio despite the clear mandate of this Court as expressed in the *Sioux City Bridge Co.* v. *Dakota County, Nebraska* 260 *U.S.* 441, which negates such an application of the law.

In that case the Court said:

"The Supreme Court of Nebraska does not make it clear whether it thinks the discrepancy charged was proved or not, but assuming the discrepancy, it holds that the Sioux City Bridge Co. has no remedy except to have the property assessed below its true value raised, rather than to have the property assessed at its true value reduced, the dilemma presented by the case where one or a few of a class of taxpayers are assessed at 100% of the value of their property in accordance with a constitutional or statute requirement and the rest of the class are intentionally assessed at a much lower percentage in violation of the law, has been dealt with by courts and *there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the Federal Courts in the enforcement of the uniformity clauses of State statutes and constitutions and of the equal protection clause of the 14th Amendment* . . . the conclusion of these and other Federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of unassessed property in the taxing district. *This Court holds that the right of the taxpayer whose property alone is taxed at one hundred percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute.*" (Emphasis ours)

In *Green Auditor, et al., Constituting the Board of Valuation and Assessments for the State of Kentucky, et al.* v. *Louisville & Interurban Railroad Co.* 244 U.S. 499, this court again held:

> ". . . Discrimination resulting from an assessment of the intangible property of a railroad corporation by the Board of Valuation and Assessment at 75 per cent of its actual value while the property of individuals and other classes of corporations, taxed at the same rate, is generally and systematically assessed by other and independent taxing authorities of the State at not more than 60 per cent of actual value, is violative of the provisions of the Kentucky Constitution requiring uniform taxation in proportion to value and an identical rate as between corporate and individual property (Sections 171, 174); and this has been recognized by the Supreme Court of the State. A decision of the state Supreme Court holding that such discrimination is not subject to correction in the courts of the State, and that the equality and uniformity provisions of the state constitution may be enforced only by selection of proper assessing officers, is not binding upon the federal courts. The Courts of the United States, their jurisdiction being properly invoked, may afford relief against discriminatory state taxation, contravening the state constitution, when the discrimination results from divergent action of different assessing boards whose assessments are not subject to any process of equalization established by the State, and where the diverse results are the outcome, not of express agreement, but of intentional, systematic and persistent undervaluation by one body of officials, presumably known to and ignored by the other body, so that in effect, the two bodies act in concert." . . .

Uniformity in taxing implies equality in the burden of taxation: and this equality cannot exist without uniformity in the basis of assessment, as well as in the rate of taxation.

> Therefore, the principal if not the sole reason for adopting "fair cash value" as the standard for valuations, is as a convenient means to an end — the end being equal taxation. But if the standard be systematically departed from with respect to certain classes of property, while applied as to other property, it does not serve but frustrates the very object it was designed to accomplish. It follows that the duty to assess at full value cannot be supreme in all cases, but must yield where necessary to avoid defeating its own purpose. . .
>
> It is equally plain that it makes no difference what basis of valuation — that is what percentage of full value — may be adopted, *provided it be applied to all alike.*" (Emphasis ours)

The question presented by this case would clearly seem to be of sufficient import to all state and municipal taxing bodies to warrant a clear and unequivocal declaration thereon by this Court at this time. For, if the authorities can validly discriminate between taxpayers, how then are they to know what is the proper course of conduct for them in tax affairs.

It is of further interest to note that the situation is of such compelling interest in Ohio that the Supreme Court of Ohio in the case of, *In Regard to Adoption of Uniform Rules and Regulations Relating to Valuation of Real Property, Carney, Auditor, Appellant* v. *Board of Tax Appeals, Appellee*, 160 O.S., 445, *has stated*;

> "Section 2, Article XII of the Ohio Constitution established a *maximum* which may not be exceeded by taxing authorities but does not provide an exclusive formula for valuation determination, and Sections 5703.02 (k), 5173.01, 5713.03 and 5715.01, Revised Code as amended by Senate Bill 109 adopted by the 102nd General Assembly, which provide for a different method of valuation determination but do not provide

that the maximum may be exceeded, are not in violation of such constitutional provisions." (Emphasis ours)

Thus, the Supreme Court of Ohio sanctions property being taxed at less than its true market value on a uniform basis but will do nothing to equalize the situation and overcome discrepancies where an individual taxpayer conclusively shows that substantially all other similarly located property is taxed at an average of 60% of true value and he has been taxed at a far greater percentage. The dilemma of the Ohio taxpayer merits the consideration and pronouncements of this Court. The question presented by this case is of great constitutional importance and frequent recurring significance and of great interest to a large mass of the populace of the United States. The serious question of equal protection under the laws in such matters has already been recognized by this Court. The serious effect of the decision below, if unreversed, upon the historic right not to be deprived of property without due process of law and equal protection of the law makes this case a particularly appropriate one for the exercising of the Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

JANUARY TERM, 1959.

Opinion Per Curiam.

BENEDICT ET AL., APPELLANTS, v. HAMILTON COUNTY BOARD OF REVISION, APPELLEE.
170 O.S. 62

Taxation — Real property — Tax valuation — Business property located in business district of city — Board of Tax Appeals — Board discretion in fixing tax valuation — Decision not disturbed by court, when.

(No. 35975 — Decided November 18, 1959.)

Appeal from the Board of Tax Appeals.

Messrs. Cors, Hair, Hartsock & Schneider and Mr. Irving Harris, for appellants.

Mr. C. Watson Hover, prosecuting attorney, and Mr. Raymond C. Wetherell, for appellee.

Per Curiam. The ultimate question confronting the court on this appeal from the decision of the Board of Tax Appeals is whether the board acted unreasonably or unlawfully in fixing the true value in money of a business property in downtown Cincinanti for tax purposes for the year 1957 at $461,600, ascribing a value of $387,360 to the land and a value of $74,240 to the building erected thereon.

In arriving at such determination the board placed its

stamp of approval on a final order of the Board of Revision of Hamilton County which made an identical determination as to tax value and wherein such board of revision reduced the value of the building by $18,560 from that placed thereon by the Auditor of Hamilton County.

In reaching its conclusion the Board of Tax Appeals had the following factors before it: The location of the property in the heart of Cincinnati and its character; its purchase at a partition sale in 1958 for the sum of $533,000; and the testimony of an expert witness that its fair market value on January 1, 1957, was in such amount.

In contesting the tax valuation placed on the property, the appellants claim that the fair market value of the property based upon capitalization of earnings was but $354,200; that the ratio between assessed valuation and the fair market value of real property in Hamilton County on January 1, 1957, was approximately 60 per cent; that in light of such facts there has been gross discrimination against appellants; and that they are justly entitled to a tax valuation on the property as of January 1, 1957, in the amount of $319,800, representing 60 per cent of $533,000, which figure was the highest fair market value of the property on such last named date.

The Board of Tax Appeals has a broad discretion in fixing tax valuations, and this court has said many times that it will not substitute its judgment for that of the board. It is to be borne in mind that the determination of the true value of each parcel of real estate, with the improvements placed on it, is a separate undertaking and does not wholly depend on values accorded other parcels in the same vicinity. A particular parcel, because of its location and the improvements thereon, may properly be given a higher value than other parcels in the same neighborhood, without discrimination resulting. After all, true value of the particular property is the controlling consideration, and this is

a question of fact primarily within the province of the taxing authorities. If there is no patent abuse apparent in fixing property valuations for taxes, a court will not disturb such finding.

On the entire record, this court can not hold that the decision of the Board of Tax Appeals herein is unreasonable or unlawful, and its decision is, therefore, affirmed.

Decision affirmed.

Weygandt, C. J., Zimmerman, Matthias, Bell and Herbert, JJ., concur.

Peck, J., not participating.

In the

SUPREME COURT OF THE STATE OF OHIO

January Term, A.D., 1959

To-wit: Wednesday, November 18, 1959

THE STATE OF OHIO,
City of Columbus,

No. 35975

ELLA BELL BENEDICT ET AL.,
Appellants,

vs.

HAMILTON COUNTY BOARD OF REVISION,
Appellee.

APPEAL FROM THE BOARD OF TAX APPEALS

This cause came on to be heard upon the transcript of the Record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the decision of the said Board of Tax Appeals be and the same hereby is affirmed for the reasons stated in the opinion rendered herein.

ORDERED, That a special mandate be sent to the Board of Tax Appeals, to carry this Judgment into Execution.

I, JOHN W. McMILLAN, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

WITNESS my hand and the seal of said Court this 25th day of November, A.D., 1959.

/s/ John W. McMillan, Clerk

Article XII, Sec. 2 of the Constitution of the State of Ohio:

"No property taxed according to value shall be so taxed in excess of one per cent of its *true value in money* for *all* state and local purposes . . . *Land and improvements thereon shall be taxed by uniform rule according to value.*" (Emphasis added)

Ohio Revised Code Section 5713.04:

"Each separate parcel of real property shall be valued at its true value in money, excluding the value of the crops, deciduous and evergreen trees, plants, and shrubs growing thereon. The price for which such real property would sell at auction or forced sale shall not be taken as the criterion of its true value. If the fee of the soil of a tract, parcel or lot of land is in any person, natural or artificial, and the right to minerals therein in another, the land shall be valued and listed in accordance with such ownership in separate entries, specifying the interests listed, and be taxed to the parties owning the different interests.

If a separate parcel of improved or unimproved real property has a single ownership, and is so used so that

part thereof, if a separate entity, would be exempt from taxation, and the balance therefor would not be exempt from taxation, the listing thereof shall be split, and the part thereof used exclusively for an exempt purpose shall be regarded as a separate entity and be listed as exempt, and the balance thereof used for a purpose not exempt, shall, with the approaches thereto, be listed at its true value in money and taxed accordingly.

The county auditor shall deduct from the value of such tracts of land lying outside of municipal corporations the acount of land occupied and used by a canal or used as a public highway at the time of such assessment."

Ohio Revised Code Section 5717.03:

"A decision of the board of tax appeals on an appeal filed with it pursuant to section 5717.01 or 5717.02 of the Revised Code shall be entered on the journal of its proceedings together with the date of such entry.

In the case of an appeal from a decision of a county board of revision the board of tax appeals shall determine the true value in money of the property whose valuation or assessment by the county board of revision is complained of, and shall determine the liability of the property for taxation, if that question is in issue, and its decision and the date of the entry thereon upon its journal shall be certified by it by registered mail to all persons who were parties to the appeal before it, to the person in whose name the property is listed, or sought to be listed, if such person is not a party to the appeal, and to the county auditor of the county in which the property involved in the appeal is located."

14th Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, and citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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v.

HAMILTON COUNTY BOARD OF REVISION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 753

ELLA BELL BENEDICT, ET AL.,
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v.

HAMILTON COUNTY BOARD OF REVISION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Hamilton County Board of Revision, respectfully submits that a writ of certiorari should not issue for the following reasons:

a. That the petition does not present a substantial Federal question, and

b. That the Federal question sought to be raised was not raised or expressly passed on by the Court below, and

c. The judgment rests on an adequate non-Federal basis.

STATEMENT OF CASE

This cause is before this Court upon a Petition for a Writ of Certiorari from a final judgment and decision of the Supreme Court of Ohio, affirming the decision of the Board of Tax Appeals, in and by which decision, the Board of Tax Appeals, upon appeal from the Hamilton County Board of Revision determined the true value in money of petitioners' real property for the tax year 1957.

The Board of Tax Appeals, in arriving at its determination, approved the final order of the Board of Revision of Hamilton County, which made an identical determination as to tax value, and wherein such Board of Revision reduced the value of petitioners' real property by $18,560.00 from the value placed thereon by the Hamilton County Auditor.

THE FEDERAL QUESTION PRESENTED IS NOT SUBSTANTIAL

Briefly stated the question presented is whether the taxing authorities of the State of Ohio, in valuing petitioners' real property for tax purposes, deprived the petitioners of due process of law, and denied them equal protection under the law, in violation of the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT

The State court did not misinterpret petitioners' contention. To petitioners' contention that the County Board of Revision and the Board of Tax Appeals should assess petitioners' property at a percentage of its true value in money, the State Court said:

> "The Board of Tax Appeals has a broad discretion in fixing tax valuations, and this court has said many times that it will not substitute its judgment for that of the board. It is to be borne in mind that the determination of the true value of each parcel of real estate, with the improvements placed on it, is a separate undertaking and does not wholly depend on values accorded other parcels in the same vicinity. A particular parcel, because of its location and the improvements thereon, may properly be given a higher value than other parcels in the same neighborhood, without discrimination resulting. After all, true value of the particular property is the controlling consideration, and this is a question of fact primarily within the province of the taxing authorities. If there is no patent abuse apparent in fixing property valuations for taxes, a court will not disturb such finding. On the entire record, this court can not hold that the decision of the Board of Tax Appeals herein is unreasonable or unlawful, and its decision is, therefore, affirmed."

It can be seen from the foregoing quoted provision of the State Court's opinion that the Court did not misinterpret petitioners' contentions, and it might also be noted that the State Court did not premise its decision on its former holding in the case of *Rollman & Sons Company* v. *Board of Revision of Hamilton County, Ohio*, 163 O. S. 363, but rather based its opinion on the record in the instant case before the State Board of Tax Appeals.

The issue raised herein has been settled by this Court in the case of *Southern Railway Company* v. *Watts, et al.*, 260 U. S. 519, wherein Justice Brandeis had the following to say:

> "The claim that plaintiffs have been denied equal protection of the laws appears to rest more largely on the charge that discrimination has been practiced against them in administering the tax laws. It is urged that county boards, proceeding under ¶ 28a of the Act of 1921, reduced real estate valuations quite generally, but that the state board, acting under ¶ 28g, refused to reduce the valuation of any railroad except that of the Norfolk & Southern. The rule is well settled that a taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20. This may be true although the discrimination is practiced through the action of different officials. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499. But, unless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause. *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 353; *Chicago, Burlington & Quincy Ry. Co.* v. *Babcock*, 204 U. S. 585; *Coulter* v. *Louisville & Nashville R. R. Co.*, 196 U. S. 599; *Sioux City Bridge Co.* v. *Dakota County, ante*, 441. Plaintiffs have clearly failed to establish that there was intentional and systematic undervaluation by the county boards . . .
>
> At the most there have been errors of judgment; and mere errors of judgment are not subject to review in these proceedings. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Backus*, 154 U. S. 421; *Brooklyn City R. R. Co.* v. *New York*, 199 U. S. 48, 52."

The petitioners rely heavily upon the decision of this Court in the case of *Sioux City Bridge Co.* v. *Dakota County, Nebraska,* 260 U. S. 441. However, petitioners fail to observe that this Court remanded the cause to the state court, inviting attention to the well established rule laid down in *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350, 353, wherein this Court said:

> "that mere errors of judgment do not support a claim of discrimination, but that there must be something more — something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party."

The equal protection clause of the Constitution does not prohibit inequality in taxation which results from mere mistake or error of judgment of tax officials; *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421, 435; *Coulter* v. *Louisville & N. R. Co.,* 196 U. S. 599, 609; *Brooklyn City R. Co.* v. *New York,* 199 U. S. 48, 52; *Sioux City Bridge* v. *Dakota County,* 260 U. S. 441, 447; *Southern R. Co.* v. *Watts,* 260 U. S. 519, 527; *Baker* v. *Druesedow,* 263 U. S. 137, 142; *Cumberland Coal Co.* v. *Board,* 284 U. S. 23, 25; *Rowley* v. *Chicago & Northwestern R. Co.,* 293 U. S. 101, 111; *Great Northern R. Co.* v. *Weeks,* 297 U. S. 135, 139; or which is not shown to be the result of intentional or systematic under-valuation of some but not all of the taxed property in a single class; *New York* v. *Barker,* 179 U. S. 279, 284, 285; *Coulter* v. *Louisville & N. R. Co., supra; Chicago, B. & Q. R. Co.* v. *Babcock,* 204 U. S. 585; *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350, 353; *Sioux City Bridge* v. *Dakota County, supra,* 447; *Southern R. Co.* v. *Watts, supra; Snowden* v. *Hughes,* 321 U. S. 1, 9.

It is submitted that petitioners have failed to establish that the county assessing authorities entertained or are chargeable with any purpose or design to discriminate against petitioners or their property.

Although petitioners in their application for rehearing in the court below briefly alluded to the case of *Sioux City Bridge Co.* v. *Dakota County, Nebraska,* 260 U. S. 441, they did not present in their assignment of error in the Supreme Court of Ohio nor in their briefs any Federal question, nor was a Federal question passed on in any way by the Supreme Court of Ohio in its opinion.

The question raised by petitioners is raised for the first time in this Court, and therefore no substantial Federal question is raised, and the opinion of the state court rests upon an adequate non-Federal basis.

We respectfully submit, therefore, that the petitioners present no substantial Federal question for the decision of this Court, and that the Writ of Certiorari prayed for should not be allowed.

Respectfully submitted,

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